Jurisdictional Statement

Supreme Court, U.S.
FILED
AUG 12 1981
ALEXANDER L. STEVAS,
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1981

No. 81-454

DALE JULIAN BARSNESS,
Appellant,

v.

STATE OF IDAHO,
Appellee.

On Appeal From The Supreme Court of Idaho

JURISDICTIONAL STATEMENT

Dale Julian Barsness, Pro. Se.
2580 N. Maple Grove
Boise, Idaho 83704

QUESTIONS PRESENTED

Whether, in view of Idaho State statutes authorizing Boise City Code section 10-3-4, section 49-606 of the Idaho Code is repugnant to the Constitution of the United States denying appellant due process and equal protection of the laws contrary to the Fourteenth Amendment.

Whether section 10-3-4 of the Boise City Code requiring emergency vehicles to use audible signal "and" emergency lights is in conflict with, and is precluded by, section 49-606 of the Idaho Code requiring emergency vehicles to use audible signal "and/or" emergency lights.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1981

No.

DALE JULIAN BARSNESS,
Appellant,

v.

STATE OF IDAHO,
Appellee.

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OPINIONS BELOW

The opinion of the Supreme Court of Idaho is as yet unreported and is set forth in the appendix of this document. The district and magistrate opinions are not reported and are also set forth in the appendix.

JURISDICTION

The nature of this proceeding is an appeal challenging the preclusion of Boise City Code section 10-3-4 with State Code section 49-606 by the Supreme Court of Idaho. The jurisdiction of this Court is invoked under 28 U.S.C. section 1257(2). The judgement sought to be reviewed was entered June 5, 1981. A notice of appeal to this Court was filed with the clerk of the Supreme Court of Idaho on August 12, 1981.

STATEMENT OF THE CASE

Dale Julian Barsness, appellant herein, is a citizen of the United States and a resident of Boise, Idaho. On July 26, 1978 the appellant was charged with "failure to yield to an emergency vehicle (I.C. 49-645)" on July 24, 1978. (R.3) The charge against the

appellant was based on a collision of three vehicles at a business intersection within the Boise City limits. The patrolman, as well as eyewitnesses, testified that the patrol car initiated overhead emergency lights with no audible signal at railroad tracks while exceeding the speed limit six hundred feet from the intersection. (Tr.5,14,15,37, 61,77)

Considerable damages occurred: the appellant's vehicle was totalled ($3,000), the police vehicle was seriously damaged ($1623) for which the city attorney has written of intent to file suit, and the third vehicle sustained $1,000 damage. The appellant was unable to initiate his new job and was treated by an osteopath for an extended time. The driver of the third vehicle was x-rayed at the hospital.

The trial judge of Magistrate's Court in Boise, resolved the factual dispute against the appellant and fined him $17.50 plus $7.50 court costs. (R.4)

Counsel for the appellant refered to the slight variation between Idaho Code section 49-606 and Boise City Code section 10-3-4. (Partial Tr. 7) He spoke of the legislature's intent as to why an emergency vehicle would need to have both siren and lights operating

while exceeding the speed limit. The actions of the police officer and his regard for the safety of others in the accident accounted for much of the testimony in the court trial held October 13, 1978.

The Magistrate without deliberation felt the officer did not have to use a siren, and ignored Boise City Code 10-3-4, as well as, evidence and reference to greater velocity of the patrol car than an impact velocity of 52-54 m.p.h. [based only upon the first 130 feet of skid marks]. (Partial Tr.8,22; Tr. 44,50,51) In his rationale, the Magistrate also misquoted the appellant. (Partial Tr. 26; Tr.89,94,95,96; See appellant's Id. Supreme Court Brief)

On December 12, 1978, appellant filed an appeal in the Fourth District Court of Ada County; Boise, Idaho. Within the appellant's "Notice of Appeal" to District Court, the two codes (B.C.C.10-3-4 and I.C.49-606) were compared and purported to be consistent with one another. (R.6) After a "Motion to Dismiss" the appeal was denied (R.9-11), appellant paid for the preparation of the "Transcript of Court Trial".

The District Court affirmed, with the reservation:

> . . .this court is precluded from determining the one issue of law appellant raised on appeal. [B.C.C.10-3-4 applies rather than I.C.49-606] The brief of the Respondent indicates that the magistrate ruled on the applicability of the Boise City Ordinance during the Defendant's Motion for Acquittal at the close of the state's evidence. [No such ruling exists] However, the trial transcript does not indicate the arguments of counsel or the ruling or rationale of the trial court. Therefore there is nothing in the record to indicate to this court whether error was committed.

"Notice of Appeal" was filed by the appellant in the Supreme Court of Idaho September 27, 1979. And, a second request was made for the "entire" "Transcript of Court Trial". The appellant set forth Uniform Vehicle Code 11-106 (Authorized Emergency Vehicles)* which is the "model" for most United States legislatures. Boise C.C. 10-3-4 requires siren and lights, while Idaho Code 49-606 differs by the optional use of siren, lights, or both. The rights of other traffic were discussed in that emergency vehicles

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*Uniform Vehicle Code: Rules of the Road with Statutory Annotations, National Committee on Uniform Traffic Laws and Ordinances. 1976 [No change as of July 1979] First published in 1926 and have been revised and republished at two to six-year intervals. "Changes are not made lightly or in any hope of any easy panacea."

must be held accountable for their actions. Boise City Code sections of 10-3-4 B-3, C, D; and Idaho Code sections of 49-606 (2) b, c, (3) and (4)

The majority opinion affirmed the District Court judgement affirming the Magistrate Court conviction and entered same on June 5, 1981. They assumed conflict existed between the two codes, Boise City Code 10-3-4 and Idaho Code 49-606, since the appellant adamantly felt he deserved an audible warning from the patrol vehicle. Therefore, a conclusion was reached that provisions of a city ordinance must yield to provisions of the state statute. The dissenting opinion of Opinion No. 59, Supreme Court case 13486, would reverse the conviction on the bases:

> "There is a compelling need for the ordinance and it does not conflict with Idaho Code section 49-606."

While other judges have chosen not to disturb the trial court findings, the dissenting opinion has investigated the facts in a rational comprehensive manner and found "clearly erroneous findings" by the trial court.

> See Appellant's Idaho Supreme Court "Reply Brief": Re Estate of Stibor('74) 96 Idaho 162; Idaho Rules of Civil Procedure, Rule 52(a); Hutchins v State, 603 P.2d 995; Appeal and Error 122

THE FEDERAL QUESTION IS SUBSTANTIAL

1. Idaho State Constitution Article XII Section 2. Local police regulations authorized. -- Any county or incorporated city or town may make and enforce, within its limits, all such local police, sanitary and other regulations as are not in conflict with its character or with the general laws.

Considering 12,000 accidents involving emergency vehicles accur each year*, the "Questions Presented" are of great public importance, particularly to those living within city limits.

Clearly, the legislative intent of Idaho Code section 49-606, was to provide the driver of an quthorized emergency vehicle the realization that both audible signal and emergency lights are effective within certain environments to warn the public that a fast moving vehicle is approaching. The Boise City Council had obviously felt-

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*CBS Sixty Minutes, November 9, 1980. See Today's Health. Published by the American Medical Association November, 1968, page 10: Officials of Physicians for Automotive Safety estimate that someone gets killed in one out of five cases of "hot pursuits" of fleeing motorists by policemen. Half of these chases end in serious injuries. Seven out of ten end in accidents. It is noteworthy that eighty percent of such cases are for minor offenses, according to Doctors Seymour Charles & Arnold Comstad of Neward & Springfield, New Jersey. These investigators est. the ann. "hot pursuit" toll at 500 killed and more than 1000 seriously injured.

the need to include both audible signal and emergency lights in order to adequately warn the public. One opinion succinctly states:

> No actual conflict exists here because emergency vehicles may easily comply with both Boise City Code section 10-3-4 and Idaho Code section 49-606. See Hobbs v. Biswell, 473 P.2d 917, 920 (N.M. App. 1970) ("The fact of double regulation does not result in the withdrawl of the municipality's authority to regulate. An ordinance may duplicate or complement statutory regulations")*

Comparison of the two codes reveals they are written effectually from the same source. The apparent options under Idaho Code 49-606 while exceeding the speed limit: siren, emergency lights, or both; do not indicate the circumstances each is applicable. Acting under the Idaho Statute, a patrolman is forced to arbitrarily decide in a moments notice which citizens shall receive how much warning of a fast moving vehicle. In the case of the appellant, there is denial of due

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*Dissenting Opinion No. 59 Idaho Supreme Court filed May 14, 1981. "Sound reasons support a city requirement which is more exacting than statutory law in this situation: Traffic density in urban areas is greater; there are more visual obstructions; and the greater frequency of intersections and traffic signals suggests that there are more opportunities for serious accidents."

process (Fourteenth Amendment) where inherently vague language of the section 49-606 of Idaho State Statute permits selective law enforcement. Smith v. Goquen, 515 U.S. 566 ('74)

Of particular note is the positioning of the words "audible signal" before "emergency lights" within the exemption section of the "model" code and the codes of Boise City and the State of Idaho. An inference may be construed as to the relative importance of each. Ordinarily, exemptions for emergency vehicles from standard traffic regulations do not exist unless their drivers are sounding an audible signal. 7A Am Jur 2d section 208 p. 385* Indeed, the previous Idaho State Code to section 49-606, Idaho Code section 49-526A ['76]. "Operation of Police Vehicles";** exempted drivers exceeding the posted speed limit only when audible signal was utilized.

2. Idaho Code Section 49-582. Powers of local authorities. -- The provisions of this title shall not be deemed to prevent local authorities with respect to streets and highways under their jurisdiction and within reasonable exercise of the police power from:

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*Rush v Sioux City (Iowa) 240 NW 2d 431; Baltimore v Fire Ins. Salvage Corps. 219 Md 75, 148 A2d 444, 82 ALR 2d 306; Kalamazoo v Priest, 331 Mich 43,

**See Appendix

Idaho Code section 49-581 indicates municipalities may enforce ordinance on matters covered by Idaho Code Title 49 when authorized. Preclusion of Boise City Code 10-3-4 by Idaho Code 49-606 is not applicable in this case since authorization does exist. Such authorization is found in the context of section 49-582 (Powers of local authorities), section 50-302 (Promotion of general welfare), and section 50-314 (Streets and Public Places -- Regulations). Section 27c of Municipal Corporations within the U.S. Supreme Court Digest: Lawyer's Edition reads:

> There is nothing in the nature of things preventing a city from exercising all the powers conferred by two or more acts, where the acts do not involve, in and of themselves, substantial contradictions.

Citizens of a city, then, have Federal Constitutional Rights under the Fourteenth Amendment to due process of law and equal protection of the laws. U.S. Supreme Court Digest: Lawyer's Edition concludes in Constitutional Law Volume 5, sections 314 and 520:

> The purpose of the clause in the Federal Constitution in respect to equal protection of the laws is to rest the rights of all persons upon the same rule under similar circumstances. Frost v Corporation Commission, 278 U.S. 515, 49 SCT 235

> Municipal ordinances adopted under state authority constitute state action and are within the prohibition of the Fourteenth Amendment. Lovell v Griffin, 303 U.S. 444, 58 S Ct 666

3. Historical Reference. The state as the original source of power is not questioned, but the power of control over streets within city limits has historically been delegated to the municipality. Owensboro v Cumberland Teleph. and Teleg. Co., 230 U.S. 58; Baltimore v Baltimore Trust and G. Co., 166 U.S. 673

The statutory powers of municipalities in Idaho are well established: ". . .courts lean strongly toward doctrine of permitting municipalities to control their own local affairs", Hodges v Tucker, 25 Idaho 563; ". . . only such rights could be exercised by them [municipal corporations] as were clearly conferred or necessarily implied. . .", State v Frederic, 28 Idaho 709; ". . .Boise City possesses full police power over affairs of local concern", State v White, 67 Idaho 309; and ". . .held that city council had implied authority, under ordinance. . "[citing I.C. section 50-302], Gondie v Mansor, 96 Idaho 345. (See Idaho Code Title 50, pgs. 452-4)

4. Negligence. Irregardless of the disposition of this Court over matters of muni-

cipal concern as related to state statute, the facts material to the "Questions Presented" are of statistical importance, e.g. Defendant's Exhibit "A": Officer's Report of Motor Vehicle Accident. Each code discussed in the preceedings, whether Uniform Vehicle Code (11-106), Boise City Code (10-3-4), or Idaho Code (49-606); devotes considerable space to cautioning the driver of an emergency vehicle to act with due regard for public safety. In determining what acts are required to meet the standard of care, all applicable statutes must be read. 24 Am Jur: Proof of Facts, p. 606.

> To evaluate the reasonableness of a town ordinance passed as a safety measure, the Supreme Court must know such things as the nature of the menace against which it will protect." Municipal Corporations, section 37: U.S. Supreme Court Digest Lawyer's Edition. Goldblatt v Hampstead 369 U.S. 590 See Municipal Corporation's Safety Rules or Regulations as Admissible Evidence. . . for Negligent Operation of Vehicle, 82 ALR 3d p. 1285

Additional U. S. Supreme Court Digests of Courts section 155(b) concludes:

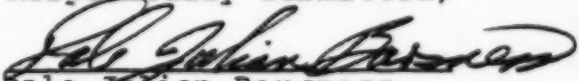
> Every intendment is to be made in favor of the lawfulness of the exercise of municipal power, making regulations to promote the public health and safety, and it is not the province of the courts, except in clear cases, to in-

erfere with the exercise of the power reposed by law in municipal corporations for the protection of local rights and the health and welfare of the people in the community. Dobbins v Los Angeles, 195 U.S. 223, 49 L Ed 169

CONCLUSION

This appeal raises an issue of fundamental importance to the safety of the public within city limits. In light of the alarming number of emergency vehicle collisions, the issue should be considered by the Court at this time.

Respectfully submitted,



Dale Julian Barsness
Appellant, Pro. Se.

APPENDIX

1981 OPINION NO. 59

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent,	)	Boise Sept. 1980 Expedited
V.	)	Filed: May 14, 1981
DALE JULIAN BARSNESS, Defendant-Appellant.	)	R.H. Young, Clerk

Appeal from the District Court of the Fourth Judicial District of the State of Idaho, Ada County. Honorable W. E. Smith, District Judge.

Appeal from district court judgment affirming magistrate court conviction for failure to yield to an authorized emergency vehicle. Affirmed.

Dale Julian Barsness, appellant, Pro. Se.

Honorable David H. Leroy, Attorney General, State of Idaho; Howard W. Carsman, Deputy Attorney General, State of Idaho, Boise, for respondent.

SHEPARD, J.

Defendant-appellant, Dale J. Barsness, was charged and convicted of violation of I.C. section 49-645 for failure to yield to an authorized emergency vehicle. That statute provides:

> "Upon the immediate approach of an authorized emergency vehicle making use of an audible or visible signal. meeting the requirements of section 40-606, Idaho Code, the driver of every other vehicle shall immediatly drive to a position parallel to, and as close as possible to, the nearest edge or curb of the roadway awful for parking and clear of any intersection and shall stop and remain in such

position until the authorized emergency vehicle has passed. * * *" (Emphasis added.)

On appeal the facts and inferences arising therefrom are construed in a manner most favorable to upholding the decision of the trial court. State v. Mundell, 66 Idaho 297, 158 P.2d 818 (1945);indicates that an authorized emergency vehicle (a police car), due to.the circumstances existing i. e. , a felony in progress, was traveling in excess of the posted speed limits within the City of Boise displaying its flashing lights but not sounding its siren. Upon the approach of the emergency vehicle, Barness did not drive as far as possible to the righthand side of the road nor did he stop until the emergency vehicle had passed. Rather, Barness made a left turn in front of the incoming emergency vehicle and collision resulted.

Whether the driver of the emergency vehicle was driving with due regard for the safety of other persons, I.C. section 49-606, was a question for resolution by the trier of the fact and will not be disturbed upon appeal. Likewise, the question of whether Barness saw or should have seen the oncoming emergency vehicle is likewise a question of fact for resolution by the trial court.

Barness argued at trial that I.C. section 49-645, permitting an emergency vehicle to utilize an audible or a visible signal, is in conflict with the Boise City Code which allegedly requires both an audible and a visible signal. Assuming such conflict exists, the provisions of a city ordinance must yield to provisions of the state statute. ID. CONST. art. as, section 2; I.C. sections 49-581, 50-302.

The district court judgement affirming the magistrate court conviction is affirmed.

BAKES, C.J., MCFADDEN AND DONALDSON, JJ., concur. BISTLINE, J., dissenting.

It was admitted before the magistrate below that the police car involved here was exheeding the speed limit.[1] Since the police car was an authorized emergency vehicle, I.C. section 49-606 allowed the officer driving the car to so exceed the limit with impunity provided that (1) "he does not endanger life or property," I.C. section 49-606(2)(c), and (2) he operates the vehicle with "due regard for the safety of all persons," I.C. section 49-606(4). I.C. section 49-645, which Barness was convicted of violating, requires that drivers yield to authorized emergency vehicles "meeting the requirements of section 49-606, Idaho Code . . ." Consequently, if

the police vehicle was not meeting the requirements of I.C. section 49-606, Barnes could not be guilty of violating I.C. section 49-645.

An examination of the Boise City Code shows that the officer here did not meet the requirements of I.C. section 49-606, i.e., he was not operating the emergency vehicle with due regard for the safety of others. The Boise City Code, section 10-3-4(c), exempts emergency vehicles from speed limits "only when the driver of any said vehicle while in motion sounds audible signals by bell, siren or exhaust whistle, as may be reasonable necessary, and when the vehicle is equipped with at least one lighted lamp displaying a red or blue light visible under normal atmospheric conditions . . . ." (Emphasis added.) The enactment of the Boise City Code section 10-3-4 was not without authority. ID. CONST.art. XII, section 2; I.C. sections 49-582, 50-302, 50-314;[2] Voyles v. City of Nampa, 97 Idaho 597 548 P.2d 1217 (1976). So long as the purposes

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1 The evidence shows that the police car, with an estimated impact speed of 52 to 54 m.p.h. after braking for some 130 feet, knocked the appellants's van into a pickup truck, and the police car itself continued on a distance of approximately 33 feet, until its kinetic energy was fully expended.

2 I.C. section 49-582 provides in part:

for which the city ordinance is enacted are valid and so long as the ordinance has the effect of law. Taggart v. Latah County, 78 Idaho 99, 298 P.2d 979 (1956). Here, the purposes of Boise City Code section 10-3-4 are clearly valid, being designed to insure that emergency vehicles which exceed the speed limit in performance of their duties take reasonable precautions to insure that their qualified exemption from obeying traffic laws does not endanger life or property.

I cannot agree with the majority's summary conclusion that the Boise ordinance conflicts with the statute. Although I.C. section 49-606(3) allows an authorized emergency vehicle to disregard traffic laws where it proceeds either with sirens ablare or displays a flashing light, or both, Boise City Code section 10-3-4 adds the requirement that within Boise City limits emer-

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(n.2) "Powers of local authorities.--(1) The provisions of this title shall not be deemed to prevent local authorities with respect to streets and highways under their jurisdiction and within the reasonable exercise of the police power from:

"(m) Prohibiting or regulating the use of heavily traveled streets by any class or kind of traffic found to be incompatible with the normal and safe movement of traffic;

(u) Prohibiting drivers of ambulances from exceeding maximum speed limits;

(v) Adopting such other traffic regulations as are specifically authorized by this title."

I.C. section 50-302 provides in part:

gency vehicles must display both a flashing light and use an audible signal, such as a siren. Simply put, the City of Boise has seen fit to go further than the state in enacting citywide safety regulations to govern the operation of fast-moving vehicles. An examination of the rules for determing whether conflicts exist between state and municipal regulations inexorably leads to the conclusion that there is no conflict here.

> "No generalization may be stated as to the results obtained in the authorities dealing with this problem, since the solution depends, in part, on local constitutional provisions, on local statutes, and especially, in the absence of the foregoing, upon whether the city has been granted specific direct authority to enact such ordinances or attempts to enact them under general, implied, or broad charter powers. . . .
> "It is fairly well agreed that there are no constitutional obstacles of a general nature which will prevent the legislature from conferring police powers or similar powers upon municipal corporations in respect of subjects which are also within the provisions of the state laws. These principles have been observed in respect to liquor regulations, Sunday observance ordinances, and ordinances regulating and suppressing gambling, controlling vagrancy and disorderly conduct, and dealing with such miscellaneous matters as nuisances, regulation of dogs, activities on the public streets and

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(n.2) "Cities shall make all such ordinances, by-laws, rules, regulation(s) and resolutions not inconsistent with the laws of the state of Idaho as may be expedient, in addition to the special powers in this act granted, to maintain the peace, good government and welfare of the corporation. . ."

I.C. section 50-314 provides in part: "Cities shall have the power to: control and limit the traffic on streets avenues and public places . . ."

thoroughfares, including the speed at which motor vehicles may be operated thereon, and public peace and good order." 56 Am. Jur.2d Municipal Corporations section 375 at 410-11 (1971) (footnotes omitted) (emphasis added).

As set forth in note two above, Idaho has specifically empowered ots cities to regulate the flow of traffic within municipal boundaries. Where there has been a specific grant of such power, we should be slow to find a conflict, especially where no actual conflict exists. No actual conflict exists here because emergency vehicles easily comply with both Boise City Code section 10-3-4 and I.C. section 49-606 . See Hobbs v. Biswell, 473 P. 2d 917, 920 (N.M.App. 1970) ("The fact of double regulation does not result in the withdrawel of the municipality's authority to regulate. An ordinance may duplicate or complement statutory regulations.") Sound reasons support a city requirement which is more exacting than a statutory law in this situation: Traffic density in urban areas is greater; there is more visual obstructions; and the greater frequency of intersections and traffic signals suggests that there are more opportunities for more serious accidents. The city has simply added to the statutory re-ments in order to accommodate the more demanding circumstances which are present when such

vehicles are driven in urban areas.

The need for stricter control of emergency vehicles operating within city limits was examined in Kuzmics v. Santiago, 389 A.2d 587 (Ps. Super. 1978):

> "More than 500 Americans die and over 1,000 sustain major injuries each year as a result of rapid police pursuit of lawbreakers, most of whom are guilty of only minor traffic offenses. . . one pursuit in five leads of the cases was someone in the car wanted for a violent crimes." Id. at 590 Pennsylvania section 4.32 (1970).

> As noted in Joyner v. District of Columbia,No. 13532-79 (D.C. Super. Ct. 1981):

> "(T)he CBS program Sixty Minutes on November 9, 1980, (revealed) . . . that is there have been an estimated 12.000 "hot pursuit" crashes a year in the United States, that such crashes have resulted in numerous deaths and injuries, and that some policemen recognize that striking an innocent bystander is a high price to pay for apprehending a fleeing suspect but, feeling "damned if we do and damned if we don't ' would 'rather be damned for doing than for not doing.' and thus take up the chase." (Footnotes omitted.)

In short, I feel that the Court is in error in so summarily striking down Boise Code section 10-3-4. There us a compelling need for the rdinance and it does not conflict with I.C. section 49-606.

Once it is decided that Boise City Code section 10-3-4 has the effect of the law, an examination of its consequences within the context of this appeal is required. It is

undisputed that the police vehicle which rammed Barness was exceeding the speed limit and was "running silently," i.e. did not have its siren going as required by the Boise City Code.

It has long held that biolation of a positive statutory inhibitation is negligence per se, and not merely prima facie evidence of negligence. Kinny v. Smith, 95 Idaho 328, 508 P. 2d 1234 (1973); Riley v. Larson, 91 Idaho 831, 432 P.2d 775 (1967); Bale v. Perryman, 85 Idaho 435, 380 P.2d 501 (1963): Anerson v Blackfoot Livestock Commision Co., 85 Idaho 64, 375 P.2d 704 (1962): Brixey v. Craig, 49 Idaho 319, 288 P. 152 (1930). This rule applies to municipal ordiances as well as statutes and regulations. See e.g., Frazier v. Northern Pac. Ry. Co., 28 F. Supp. 20(D. Idaho 1939). This rule has proper application where emergency vehicles are affirmatively charged by statute, with the duty of acting with "due regard for the safety of all persons." In determining that which constitutes due regard for the safety of others, I can think of no better source than a municipal ordinance which legislatively determines the minimum standards of conduct required in exactly the circumstances present here.

Since there is no question but that the Boise City police vehicle here was being operated in violation of Boise City Code section 10-3-4, I would hold that, as a matter of law, the police vehicle was not being driven "with due regard for the safety of all persons" as required by I.C. section 49-606(4). Since the vehicle did not meet the requirements of I.C. section 49-606, Barness cannot be said to have violated I.C. section 49-645 by failing to yield. See e.g , Coughran v. Hickox, 82 Idaho 18, 25-26, 348 P.2d 724, 728 (1960) (person who ordinarily would have right of way loses that right when in violation of the law); Chastain v. Rook, 266 P.2d 131, 133 (Cal.App. 1954) (driver not required to yield to emergency vehicle where vehicle fails to give proper warning). The conviction should be reversed.

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

STATE OF IDAHO,
Plaintiff,
V.
Dale J. Barness,
Defendant,

Case No. 8413

DECISION ON APPEAL AND ORDER

Appearances :
Counsel for Plaintiff - Mary Susan Mather
150 Capitol Blvd.
Boise Idaho, 83701

Counsel for Defendant- Pro se on Appeal

This case is before the Court on appeal from a judgement entered on October 13,1978 the Defendant Dale J. Barness guilty of Operatinf a Vehicle, I.C. section 49-645. The Defendant was tried before a magistrate sitting without a jury, found guilty and fined $17.50 plus court costs.

The Defendant, appearing pro se on appeal, has not requested a trial de novo. A litigant who chooses to represent himself, either at

trial or on appeal, is held to the same standards and rules as an attorney. State v. Sima 98 Idaho 643, 570, P.2d 1333 (1977); Scafeo v. Rigby & Mason, 98 Idaho 432, 566 P.2d 381 (1977); Scate v. Kelly, 95 Idaho 851, 521 P.2d 1150 (1974) In State v. Sima supra, the Supreme Court held.

> Upon appeal, appellant carries the burden presenting such a record as to enable our review of the asserted error. In the abscence thereof we will not presume error. State v. Peterson, 87 Idaho 147, 391 P.2d 846 (1964). A litigant appearing pro se is held to the same standards and rules as one appearing with counsel. 98 Idaho at 644.

In its letter 'brief' and reply 'brief', the defendant appears to raise three arguments on appeal: (1) That defendant's counsel should have, but failed to object to the admission of certain evidence at trial, (2) that the court reconsider the facts relating to the police officer's speed and manner of driving, and (3) that the officer exceeding the speed limit and therefore should have used both its overhead lights and a siren pursuant to the Boise City Code. This Court is aware that appellate misconstrues the function of an appellate court by his request for this Court to review and evaluate the facts of this particular case. Pursuant to Rule 9 of the Idaho Criminal Appellate Rules, the Idaho Rules of Civil Procedure apply to criminal appeals to the District Court. Idaho Rule of Civil Pro-

cedure 83(b) provides in relevant part that all appeals from the Magistrate's Division shall be heard by the district court as an appellate preceeding unless the district court orders a trial de novo. Idaho Rule of Civil Procedure 83(a)(1) states the scope of appellate review on appeal to the District Court as follows:

> Upon on appeal from the magistrate's division of the district court, not involving the trial de novo, the district court shall review the case on the record and determine the appeal as an appellate court in the same manner and upon the same standards of review as an appeal from the district court to the supreme court under the statutes of law of this state, and the appellate rules of the supreme court.

Since the appellant has not requested, nor has this court ordered a trial de novo, the function of this court on defendant's appeal from conviction is to examine the record to determine if competent and substantial evidence exists in the record to support the verdict. State v. Warden, 97 Idaho 752, 554 P.2d 684 (1976); State v. Griffin 97 Idaho 52, 539 P.2d 604 (1975). Where there is substantial and competent evidence to support the verdict, such will not be disturbed, but where the evidence is insufficient to support the verdict, the verdict and judgement of conviction must be set aside. State v. Warden, 97 Idaho 752, 754, 554 P.2d 684 (1976). Matters outside the record cannot be considered on appeal, but must

be raised, if at all, by application for post conviction relief. State v. Congdon, 96 Idaho 377, 529 P.2d 733. In reviewing the decision of the magistrate on the record as an appellate court, it would be an error for the district court to substitute its own evaluation of evidence for that of the magistrate. In the matter of Matthews, 97 Idaho 99, 540 P.2d 284 (1975).

In the case at bar, the magistrate found the defendant guilty of operating a vehicle on the approach of an emergency vehicle. This court holds that on the basis of the record in this case, the evidence sustains defendant's conviction.

Idaho Code Section 49-645(1) provides:

> Upon the immediate approach of an authorized emergency vehicle making an audible or visible signal meeting the requirements of section 49-606, Idaho Code, the driver of every other vehicle shall yield the right-of-way and shall drive immediately to a position parallel to, and as close as possible to, the nearest edge or curb of the roadway lawful for parking and clear of any intersection and shall stop and remain in such position until the authorized emergency has passed, except when otherwise directed by a police officer.

At the time relevant to the events in question, Officer Hampton testified he was responding to a burglary in progress in his police vehicle. Officer Hampton admitted to exceeding the posted speed limit. However, Idaho Code Section 47-606 permits a driver of an authorized emergency vehi-

cle to exceed the speed limit provided the vehicle is making use of either lights or siren or both.

Hampton admits he did not activate his siren, but he testified that he had turned on his 360 degree blue overhead light. Four other witnesses to the accident that accurred between defendant's vehicle and Officer Hampton did in fact have his overhead lights on. Witnesses to the incident also testified that they saw the police vehicle approaching the intersection, and that the defendant did not stop but was turning his vehicle left across the oncoming lane of traffic. Other vehicles, including the two vehicles directly behind the defendant, saw the police vehicle approaching and pulled to the right hand of the roadway.

So, while Officer Hampton was exceeding the speed limit, there was substantial evidence to support the finding that Officer Hampton was operating an authorized emergency vehicle, that he had his blue overhead lights on, and that Defendant failed to yield to the oncoming police vehicle.

Defendant's requests that the court reconsider the speed of the police vehicle. The issue of the officer's speed was a question of fact for the magistrate to deter-

mine. As stated before, in its capacity as an appellate court, this court may not substitute its evaluation of the evidence for that of the magistrate where its evaluation of the evidence for that of the magistrate where there is substantial and competent evidence to support the verdict. In the Matters of Matthews, 97 Idaho 99, 540 P.2d 284 (1975), State v. Warden, 97 Idaho 752, 554 P.2d 684 (1976). Further appellant's complaint about the failure of his defense counsel to object to the testimony offOfficer Prynch that according to his calculations, Officer Hampton's minimum speed was 52.5 miles per hour cannot be considered by the court. This court may not review the admissibility of testimony when the objections to the evidence are raised for the first time on appeal. State v. Hatton, 95 Idaho 856, 522 P. 2d 64 (1974) State v. Wozniak, 94 Idaho 321, 486 P.2d 1025 (1971).

Also, this court is precluded from determining the one issue of law appellant raised on appeal. Appellant believes that Section 10-3-4 of the Boise Code which allows the driver of an authorized emergency vehicle to exceed the speed limit if both a siren and overhead are activated applies rather than Idaho Code 49-606 which requires either lights or siren to be activated. The brief of the Respondent indi-

cates that the magistrate ruled on applicability of the Boise City Ordinance during the Defendant's Motion for Acquittal at the close of the state's evidence. However, the trial transcript does not indicate the arguments of counsel or the ruling or rationale of the trial court. Therefore, there is nothing in the record to indicate to this court whether error was committed. It is well established In Idaho that an applellate court cannot consider matters not included in the record before it. State v. Lawrence, 97 Idaho 775, 554 P.2d 953 (1976). State v. Congdon, 96 Idaho 377, 529 P.2d 773 (1974).

Appellant has not advanced any grounds upon which the court may overturn the verdict of guilty. Since there is substantial and competent evidence in the record to support the magistrate's verdice, this court affirms and the cause is remanded to the Magistrate's division for execution of judgement.

Dated this ____ day of _____1979.

_____

District Judge

MAGISTRATE OPINION

From

PARTIAL TRANSCRIPT OF COURT TRIAL

BOISE, IDAHO

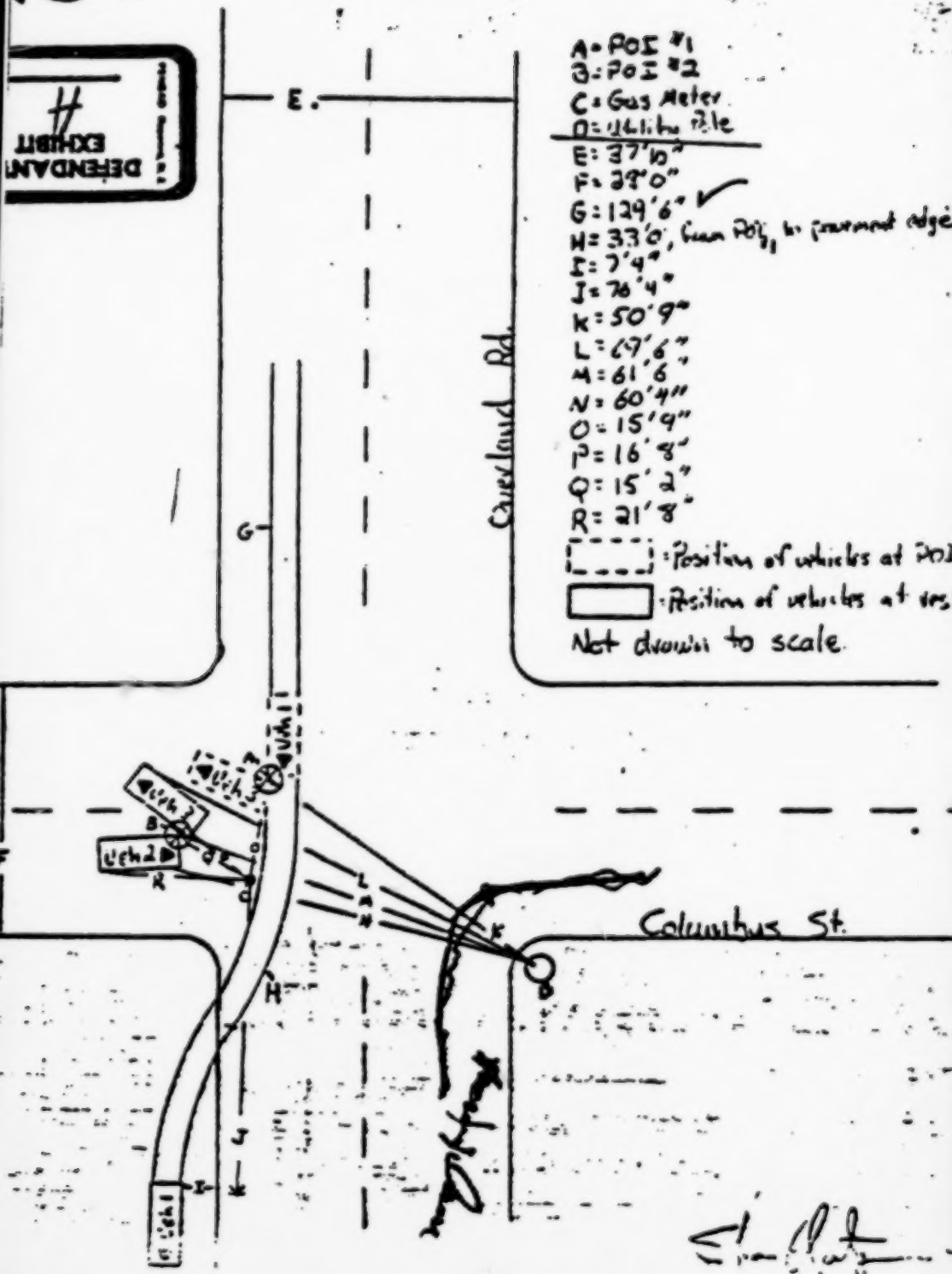
OCTOBER 13, 1978 (R.4)

THE COURT: You're welcome. Well, I'm going to be very brief. I. . .think everything's been said on the record and I'm not going to rehash the record. I'm going to let the record speak for itself. However, Mr. Barsness, I do have a couple comments. Number one, I'm going to find you guilty of the charge of Failing to Yield to an Emergency Vehicle While Making a Left Turn. Number one, I have--my statement is, I have to believe everybody is telling me the truth that testified today. I don't disbelieve a person. I think what happened here, you made an error in judgement. You, in your own words and the Prosecutor brought this out, you saw the police car come flying over the railroad crossing. Now, I'm not exactly clear where you were in your position on making your turn, but it seems to me that you were in a position at that time, where you could've stopped and let the police car go by. Now, as I said before, I just-- I think

you just made an error in judgement this time. You thought you could beat the police car across. In other words, you felt in your mind the way I feel, that you committed yourself and you had to carry it on through. Now, we'll get down to one point here too, whether the officer was wrong in not using his siren. Well, according to the Code he doesn't have to use his siren. He can use either the siren or the lights or a combination of both. And we brought out about the speed. The only thing the Court can go by is what Officer Prynch testified; that he took measurements of the skid marks and using his nomographs (phonetic) and all his materials and equations that he uses, the speed at the time of impact, was between 52 and 54 miles an hour. And I have no other evidence to disprove that.

12

DEFENDANT EXHIBIT #



BOISE CITY CODE
10-3-4

AUTHORIZED EMERGENCY VEHICLES:

(A) The driver of an authorized emergency vehicle, when responding to an emergency call or when in the pursuit of an actual or suspected violator of law or when responding to but not upon returning from such alarm, may exercise the privileges set forth in this Section, subject to the conditions herein stated.

(B) The driver of an authorized emergency vehicle may:

1. Park or stand, irrespective of the provisions of this Chapter;

2. Proceed past a red or stop signal or stop sign, but only after slowing down as may be necessary for safe operation;

3. Exceed the maximum speed limit;

4. Disregard regulations governing direction of the movement of traffic or turning in specified directions.

(C) The exemptions herein granted to an authorized emergency vehicle shall apply only when the driver of any said vehicle while in motion sounds audible signals by bell, siren or exhaust whistle, as may be reasonably necessary, and when the vehicle is equipped with

at least one lighted lamp displaying a red or blue light visible under normal atmospheric conditions from a distance of five hundred feet (500') to the front of such vehicle, except that an authorized emergency vehicle operated as police vehicle need not be equipped with or display a red or blue light visible from in front of the vehicle.

(D) The foregoing provisions shall not relieve the driver of any authorized emergency vehicle from the duty to drive with due regard for the safety of all persons, nor shall such provisions protect the driver from the consequences of his reckless disregard for the safety of others.

IDAHO CODE
49-581

PROVISIONS UNIFORM THROUGHOUT THE STATE: The provisions of this title shall be applicable and uniform throughout this state and in all political subdivisions and municipalities therein and no local authority shall enact or enforce any ordinance on a matter covered by the provisions of this title unless expressly authorized.

IDAHO CODE
49-582

POWERS OF LOCAL AUTHORITIES

(1) The provisions of this title shall not be deemed to prevent local authorities with respect to streets and highways under their jurisdiction and within the reasonable exercise of the police power from:

(h) Regulating or prohibiting the turning of vehicles or specified types of vehicles;

(j) Requiring written accident reports as authorized in section 49-627, Idaho Code;

(m) Prohibiting or regulating the use of heavily traveled streets by any class or kind of traffic found to be incompatible with the normal and safe movement of traffic;

(t) Adopting and enforcing such temporary or experimental regulations as may be necessary to cover emergencies or special conditions;

(v) Adopting such other traffic regulations as are specifically authorized by this title.

IDAHO CODE
49-606

AUTHORIZED EMERGENCY VEHICLES:

(1) The driver of an authorized emergency vehicle, when responding to an emergency call or when in the pursuit of an actual or suspected violator of the law or when responging to but not upon returning from a fire alarm, may exercise the priviledges set forth in this section, but subject to the conditions herein stated:

(2) The driver of an authorized emergency vehicle may:

(a) Park or stand, irrespective of the provisions of this title;

(b) Proceed past a red or stop signal or stop sign, but only after slowing down as may be necessary for safe operation;

(c) Exceed the maximum speed limits so long as he does not endanger life or property;

(d) Disregard regulations governing direction of movement or turning in specified directions.

(3) The exemptions herein granted to an authorized emergency vehicle shall apply only when such vehicle is making use of an audible signal having a decibel rating of at least one hundred (100) at a distance of ten (10) feet and/or is displaying a flashing a flashing light or lights visible in a 360 degree arc at a distance of one thousand (1,000) feet under normal atmospheric conditions or both. Only a police vehicle operated as an emergency vehicle shall display at least one (1) blue light and all other authorized emergency vehicles shall display at least one (1) red light meeting the above visibility requirements.

(4) The foregoing provisions shall not relieve the driver of an authorized emergency vehicle from the duty to drive with due regard

for the safety of all persons, nor shall such provisions protect the driver fromthe consequences of his reckless disregard for the safety of others.

IDAHO CODE
49-645

OPERATION OF VEHICLES ON APPROACH OF AUTHORIZED EMERGENCY VEHICLES:

(1) Upon the immediate approach of an authorized emergency vehicle making use of an audible or visible signal, meeting the requirements of section 49-606, Idaho Code, the driver of every other vehicle shall yield the right-of-way and shall immediately drive to a position parallel to, and as close as possible to, the nearest edge or curb of the roadway lawful for parking and clear of any intersection and shall stop and remain in such position until the authorized emergency vehicle has passed, except when otherwise directed by a police officer.

(2) This section shall not operate to relieve the driver of an authorized emergency vehicle from the duty to drive with due regard for the safety of all persons using the highway.

IDAHO CODE
50-302

PROMOTION OF GENERAL WELFARE --
PRESCRIBING PENALTIES:

Cities shall make all such ordinances, by-laws, rules, regulation [regulations] and resolutions not inconsistent with the laws of the state of Idaho as may be expedient, in addition to the special powers in this act granted, to maintain the peace, good government and welfare of the corporation and its trade, commerce and industry. Cities may enforce all ordinances by fine or incarceration; provided, however, that the maximum punishment of any offense shall be by fine of not more than three hundred dollars ($300) or by imprisonment not to exceed six (6) months, or by both such fine and imprisonment.

IDAHO CODE
50-314

STREETS AND PUBLIC PLACES -- REGULATIONS:

Cities shall have power to: control and limit the traffic on streets, avenues and public places; regulate and control all encroachments upon and into all sidewalks, streets, avenues, and alleys in said city; remove all obstructions from the sidewalks, curbs, gutters and crosswalks at the expense of the person placing them there.

IDAHO CONSTITUTION
ARTICLE XII SEC.1-2

CORPORATIONS, MUNICIPAL

Sec. 1. General laws for cities and towns. -- The legislature shall provide by general laws for the incorporation, organization and classification of the cities and towns, in proportion to the population, which laws may be altered, amended, or repealed by the general laws. Cities and towns heretofore incorporated, may become organized under such laws, whenever a majority of the electors at a general election, shall so determine, under such provisions therefor as may be made by the legislature.

Sec. 2. Local police regulations authorized. -- Any county or incorporated city or town may make and enforce, within its limits, all such local police, sanitary and other regulations as are not in conflict with its charter or with the general laws.

28 U.S.C
1257 (2)

STATE COURTS; APPEAL; CERTIORARI:

Final judgements or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

UNIFORM VEHICLE CODE
11-106

AUTHORIZED EMERGENCY VEHICLES:

(a) The driver of an authorized emergency vehicle, when responding to an emergency call or when in the pursuit of an actual or suspected violator of the law or when responding to but not upon returning from a fire alarm, may exercise the privileges set forth in this section, but subject to the conditions herein stated.

(b) The driver of an authorized emergency vehicle may:

1. Park or stand, irrespective of the provisions of this chapter;

2. Proceed past a red or stop signal or stop sign, but only after slowing down as may be necessary for safe operation;

3. Exceed the maximum speed limits so long as he does not endanger life or property;

4. Disregard regulations governing direction of movement or turning in specified directions.

(c) The exemptions herein granted to an au-

thorized emergency vehicle shall apply only when such vehicle is making use of an audible signal meeting the requirements of 12-401(d) and visual signals meeting the requirements of 12-218 of this act, except that an authorized emergency vehicle operated as a police vehicle need not be equipped with or display a red light visible from in front of the vehicle.

(d) The foregoing provisions shall not relieve the driver of an authorized emergency vehicle from the duty to drive with due regard for the safety of all persons, nor shall such provisions protect the driver from the consequences of his reckless disregard for the safety of others.

VEHICLE CODES EXPIRED
49-526,49-526A

AUTHORIZED EMERGENCY VEHICLES:

(a) The driver of an authorized emergency vehicle, when responding to an emergency call or when responding to, or while in the process of conbating a fire, but not upon returning from a fire alarm, may exercise the privileges set forth in this section, but subject to the conditions herein stated.

(b) The driver of an authorized emergency vehicle may:

1. Park or stand, irrespective of the

provisions of this act;

2. Proceed past a red or stop signal or stop sign, but only after slowing down as much as may be necessary for safe operation of the emergency vehicle;

3. Exceed the prima facie speed limits so long as he does not endanger life or property;

4. Disregard regulations governing direction of movement of traffic or turning of traffic in specified directions.

(c) The exemptions herein granted to an authorized emergency vehicle shall apply only when the driver of any said vehicle while in motion sounds audible signals by bell, siren, or exhaust whistle as may be reasonably necessary, and when the vehicle is equipped with at least one (1) lighted lamp displaying a red light visible under normal atmospheric conditions from a distance of five hundred (500) feet to the front of such vehicle.

(d) The foregoing provisions shall not relieve the driver of an authorized emergency vehicle from the duty to drive with due regard for the safety of all persons, nor shall such provisions protect the driver from the consequences of his reckless disregard for the safety of others.

OPERATION OF POLICE VEHICLES:

(a) The driver of a police vehicle, when responding to an emergency call or when in pursuit of an actual or suspected violator of the law, may exercise the privileges set forth in this section, but subject to the conditions herein stated.

(b) The driver of a police vehicle may:

1. Park or stand, irrespective of the provisions of this act;

2. Proceed past a red or stop signal or stop sign, but only after slowing down as much as may be necessary for safe operation of the police vehicle;

3. Exceed the prima facie, posted or maximum speed limits so long as the driver does not endanger life or property;

4. Disregard regulation governing direction of movement of traffic or turning of traffic in specified directions.

(c) The exemptions herein granted to a police vehicle shall only apply when the driver of any police vehicle, while in motion, sounds an audible signal by electrical or mechanical siren, as may be reasonably necessary.

(d) The foregoing provisions shall not relieve the driver of a police vehicle from the duty to drive with due regard for the safety

of all persons, nor shall such provisions protect the driver from the consequences of his reckless disregard for the safety of others.

IN THE SUPREME COURT OF THE STATE OF IDAHO

DALE JULIAN BARSNESS, Appellant)
)
v.) No. 13486
)
STATE OF IDAHO)

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

Notice is hereby given that Dale Julian Barsness, the appellant above named, hereby appeals to the Supreme Court of the United States from the final order of the Supreme Court of Idaho, affirming the judgement of conviction, entered herein on June 5th, 1981.

This appeal is taken pursuant to 28 U.S.C. Section 1257 (2).

Aug. 11, 1981

Dale J Barsness

Appellant, Pro. Se.
2580 N. Maple Grove
Boise, Idaho 83704

FILED
AUG 11 1981
SUPREME COURT OF
R. H. YOUNG, CLERK

PROOF OF SERVICE

I acknowledge that three copies of the notice, "Notice of Appeal", was served in person to the office of:

Honorable David H. Leroy, Att. Gen.
Statehouse, Room 210
Boise, Idaho 83720

in accordance with Supreme Court Rules 28.5 (a) on this 11th day of August 1981.

Trish Sugnbill
office of attorney Gener